No. 14415

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY A. KUCKENBERG, HARRIET KUCKENBERG, and LAWRENCE KUCKENBERG, Doing Business As KUCKENBERG CONSTRUCTION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Appellee.

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court
For the District of Oregon.

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AUTHORITIES CITED

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REPLY TO APPELLEE'S ANSWER TO SPECIFICATION OF ERROR NO. 1

Appellee has cited and primarily relied upon three cases to substantiate its contention that the insurance company owes no liability to its insured under the liability policy issued.

United States Fidelity & Guarantee Co. v. Briscoe, 239 P. (2d) 754, (Okla. 1951) and *C. Y. Thomason Co. v. Lumbermen's Mutual Casualty Co.,* 183 F. (2d) 729 (C.C.A. 10th) are of the same nature. In both the contractor intentionally committed wrongful acts and the inevitable result was damage. In both, the wrongful acts were in the nature of nuisances. In the Briscoe case the contractor operated a cement loading mill across the street from the Taylor's, with the inevitable result, that cement dust permeated the air with resulting damage to the Taylor property. The Taylor's brought a suit sounding in nuisance against the contractor and prevailed. In the Thomason case the contractor dug a ditch in front of a commercial garage which blocked access to the garage. Of course, the damage to the garage was not considered by the Court to be caused "by accident".

The facts in these two cases are obviously not comparable to those in the instant case. Here the appellant contractor did not intentionally commit any act which would inevitably cause damage. The best proof of this is that while the appellants constantly excavated by blasting and shoveling and etc. for over a year in generally similar terrain the damage sued for was only caused on the dates stated in the testimony. For example, in October, 1947, superintendent Lind testified as follows:

> "October 8th, Station 635, at this time there was a great deal of blasting in this vicinity of these stations. Well, in that place at Station 633, there was an awful lot of rock moved. I said a hundred thousand yards of rock, which by the (37) plans

you can total it, and that is probably what it totaled up, and although we had a little railroad damage through there, occasionally a rock would roll down our roadbed, roll down and hit the railroad track, and that is what those were made up of." (Tr. pp. 98-99)

Neale Construction Co. v. United States Fidelity & Guarantee Co., 199 F. (2d) 591 (C.C.A. 10th) is the third case primarily relied upon by the appellee. In that case the insured contractor defectively performed its contract with the owner and the owner sued the contractor for failure to perform alleging as damages the owner's costs in repairing the defective work of the contractor. The Court very readily held that a liability insurance policy does not cover failure to perform a construction contract.

Appellee Hartford Accident & Indemnity Company's views of the limited scope of a liability policy are most obviously revealed in those sections of its brief concerning the construction contract of the appellee (pp. 3-5) and blasting (pp. 21-22). The appellee Hartford apparently believed that that section of the contract which required the contractor to "protect the railroad against damage" (Ex. 1, p. 4) was of great significance and set out this clause verbatim. Many leases require the lessee to protect the lessor against damage to the lessor; many timber cutting agreements require the logger to protect the timber owner against damage. Apparently appellee Hartford's contention is that such a contracting lessee or logger would have no coverage under Hartford's liability policy because of the fact that the

lessee or logger undertook such obligation is an indication that damage will occur and because there is a possibility of damage, any damage that does occur does not occur "by accident".

This contract which the appellee had for the construction of the road stated that in one section of the construction interference with the continuous operation of the railroad would seem to be unavoidable and there was possible damage to the facilities of the railroad (Ex. 1, p. 6). In this same vein appellee has pointed out "the act of blasting raises a high degree of certainty that certain injuries to property in the neighboring area will be caused by falling rock and debris" (App. Br. p. 21). The position of the appellee Hartford must be, although they do not directly so state, that if damage is possible, or the chances of damage are inherent in the operation, such as they deem in the case of blasting, their liability policy does not cover. Under the appellee Hartford Accident & Indemnity Company's view of the coverage of their liability policy persons engaged in activities coming within the purview of *Rylands v. Fletcher,* L.R. 3 H.L. 330, such as storers of water, keepers of fire, handlers of gasoline, would have no coverage because any damage caused by such occupations could not possibly be "caused by accident". The appellee has cited no cases in support of this contention and the appellants believe there are none. Instead of following the underwriting maximum that the premium should vary with the risk, the appellee Hartford apparently takes the position that if the risk is greater than they deem normal they simply afford no coverage under their liability policy.

The crux of appellee's contention is that the work required of appellant under its contract with the Bureau of Public Roads was such that the chances of damage were almost, if not completely, inevitable. Appellants freely admit that it would have been almost impossible to perform the work required of them without at sometime or someplace causing damage to the railroad. Appellants also assert as a belief that no other construction job of comparable scope could be completed without some item of damage at sometime or at someplace to adjoining property. Appellants emphatically assert that because damage, somewhere, somehow, is bound to occur does not thereby mean that such damage is not "caused by accident" within the meaning of a liability insurance policy. Yet the Trial Court held that no items of damage to the railroad track, occurring at any place, by any means, or at any time, was caused by accident. Appellants respectfuully submit that in so holding the Trial Court erred.

The essence of appellants' testimony was that work of a certain nature was carried on in certain places,—the work went on and no damage was done to the railroad track and suddenly, a rock, rocks or part of a cliff fell in such a manner as to cause damage to the track. The appellant roadbuilder knew that at sometime, someplace damage might be done to the track. The acts causing the damage were not done intentionally and they were not done with the knowledge that these particular acts were likely to cause damage.

Judicial decisions seem united in stating that "* * * the words, 'accident' and 'accidental' have never ac-

quired any technical meaning in law, and when used in an insurance contract they are to be construed and considered according to common speech and common usage of people generally". *United States Fidelity & Guarantee Co. v. Briscoe,* supra. In common speech and usage how could it be anything other than an "accident" when appellants shot, in a manner approved by the United States Engineers, and brought down in one blast 12,000 more yards of rock than either of the appellants or the engineers had planned and thus by reason of the excess quantity of rock caused damage to the track (Tr. p. 85). In common speech and usage, how could it be anything other than an accident when the appelants were drilling in an area about a quarter of a mile away from the railroad track and their drilling caused a snag to come tumbling down from a quarter of a mile and damage the track (Tr. p. 88). Yet the Trial Court held, and the appellants respectively submit erroneously, that such damages were not "caused by accident".

Common speech and usage have given to "accident" a meaning that the particular damage, or injury, was caused suddenly, was not caused intentionally, and was not done with the state of mind that believed an injury would likely or probably occur because of a particular act or omission. If the meaning of "accident" were extended beyond this, coverage under any liability policy would become a question fact; liability imposed only upon a finding of gross negligence would probably not be covered at all. Persons engaged in pursuits commonly believed to involve more hazards to others than normal

would not be covered by a liability policy such as written by the appellee Hartford. The contract which the appellee Hartford has so all embracingly captioned a "comprehensive bodily injury and property damage liability policy" would be nothing but an illusion to those most reliant on liability insurance. The appellants Kuckenberg respectfully submit that the particular acts of damage here involved were "caused by accident"; they were not intentionally caused and they were not committed under a belief that damage would likely or probably occur and respectfully submit that the Trial Court committed error in finding to the contrary.

APPELLANTS' REPLY TO APPELLEE'S ANSWER TO SPECIFICATION OF ERROR NO. 2

In attempting to answer appellants specification of error No. 2, appellee first asserted that they had no duty because Southern Pacific's counterclaim was based upon contract. This assertion is immaterial as the only issue at this stage of proceeding was whether or not the damage was caused "by accident" as stated in the Findings of Fact (Tr. p. 47). Regardless of whether the liability was based upon contract or upon tort the question still remains undecided whether the insurance coverage allegedly provided by Hartford covered obligations assumed by contract or only liability imposed by tort. Southern Pacific contended in their counterclaim that Kuckenberg was liable to Southern Pacific for the dam-

age to the track which was repaired by Southern Pacific on the basis of contract, negligence, intention, or absolute liability.

The appellee Hartford also states that it had no duty to defend the appellant Kuckenberg against the counterclaim by Southern Pacific because the appellants had violated the policy of insurance and had failed to meet the conditions of the policy. These again were facts which none of the parties, had called upon the Trial Court, at this stage of the proceedings, to determine.

Appellee also states that they have no obligation to defend because the action was brought by the insured appellants. It is believed sufficient to say that a counterclaim, as that commenced by the Southern Pacific, is of the same category as if Southern Pacific had commenced an original action against the appellants.

Appellee deemed it would have been "an absurdity" to require them to defend because their defense of the counterclaim would have been contrary to their position as a defendant in the action by the defendant Kuckenberg. The appellee could defend against the defendant Kuckenberg on any ground that it chose, but Southern Pacific chose counterclaim for damages against Kuckenberg on the grounds, among others, that the damage allegedly incurred occurred by reason, among other things, of the negligence or absolute liability, by reason of blasting, on the part of the appellant Kuckenberg. This is a claim which the appellee Hartford was bound to defend. It is the basis upon which Southern Pacific brought its claim, not the basis upon which Hartford

believed the claim should have been brought, that determined the obligation of Hartford to defend the counterclaim.

It is respectfully submitted that the Trial Court erred in concluding that the appellee was not required to appear and defend on behalf of the defendant Kuckenberg against the action or claims brought against said appellants by the Southern Pacific Company.

Respectfully submitted,

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